



**Original: English**

**No. [REDACTED]  
Date: [REDACTED]**

**THE APPEALS CHAMBER**

**Before: Judge Howard Morrison, Presiding Judge  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]**

**SITUATION IN [REDACTED]**

**IN THE CASE OF THE PROSECUTOR v. [REDACTED]**

**Public redacted document**

**Judgment  
on the appeal of the Prosecutor against the decision of [REDACTED]**

**Judgment to be notified in accordance with regulation 31 of the Regulations of the Court to:**

**The Office of the Prosecutor**  
Ms Fatou Bensouda, Prosecutor  
Ms Helen Brady

**[REDACTED]**

## **REGISTRY**

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**Registrar**  
Mr Herman von Hebel

The Appeals Chamber of the International Criminal Court,

In the appeal of the Prosecutor against the decision of [REDACTED],

After deliberation,

By majority, [REDACTED] partly dissenting,

*Delivers* the following

## JUDGMENT

1. The “Decision [REDACTED] is reversed and the matter [REDACTED] is remanded to [REDACTED].
2. [REDACTED].

## REASONS

### I. KEY FINDING

1. There is no requirement that property and assets subject to a Chamber’s request for cooperation under articles 57 (3) (e) and 93 (1) (k) of the Statute be derived from or otherwise linked to alleged crimes within the jurisdiction of the Court.

### II. PROCEDURAL HISTORY

#### **A. Proceedings before the [REDACTED]**

2. On [REDACTED] issued the “Order to the Registry regarding requests for cooperation for the identification, tracing and freezing or seizure of assets of [REDACTED]”<sup>1</sup> (hereinafter: “Cooperation Request”), in which it ordered the Registrar to prepare and transmit to certain States “requests for cooperation pursuant to articles 93(1)(k) and 96 of the Statute seeking the identification, tracing and freezing or seizure of proceeds, property and assets which are owned or controlled directly or indirectly” by [REDACTED].<sup>2</sup>

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<sup>1</sup> [REDACTED].

<sup>2</sup> [REDACTED].

3. On [REDACTED], the Registrar informed [REDACTED].<sup>3</sup>
4. On [REDACTED], the [REDACTED] Chamber found that “only assets held directly or indirectly by [REDACTED] are to be frozen pursuant to the Cooperation Request”, and clarified that “if [REDACTED]”.<sup>4</sup>
5. On [REDACTED], the Registrar transmitted to the [REDACTED] Chamber a [REDACTED]<sup>5</sup> (hereinafter: “Request for Clarification”).
6. On [REDACTED], [REDACTED],<sup>6</sup> rendered the [REDACTED]<sup>7</sup> (hereinafter: “Impugned Decision”), in which [REDACTED] determined that the assets identified by [REDACTED] do not fall within the Cooperation Request given, *inter alia*, that there is “no reasonable basis to consider that these assets may have derived, directly or indirectly, [REDACTED] from the crimes for which [REDACTED], or that any link may exist between these assets, [REDACTED], and the crimes alleged [REDACTED]”.<sup>8</sup>
7. On [REDACTED], the Prosecutor requested leave to appeal the Impugned Decision in relation to the following issue: “[w]hether assets subject to a Chamber’s order and request for cooperation under articles 57(3)(e) and 93(1)(k) of the Statute must be derived from or otherwise linked to alleged crimes within the jurisdiction of the Court”.<sup>9</sup>
8. On [REDACTED], the [REDACTED] granted the Request for Leave to Appeal.<sup>10</sup>

## **B. Proceedings before the Appeals Chamber**

9. On [REDACTED], the Prosecutor filed the “Prosecution’s appeal against [REDACTED]”<sup>11</sup> (hereinafter: “Document in Support of the Appeal”), in which she

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<sup>3</sup> [REDACTED].

<sup>4</sup> [REDACTED].

<sup>5</sup> [REDACTED].

<sup>6</sup> [REDACTED].

<sup>7</sup> [REDACTED].

<sup>8</sup> Impugned Decision, [REDACTED].

<sup>9</sup> [REDACTED].

<sup>10</sup> [REDACTED].

<sup>11</sup> [REDACTED].

requested, *inter alia*, that the Appeals Chamber suspend the effect of the Impugned Decision under article 82 (3) of the Statute.<sup>12</sup>

10. On [REDACTED], the Appeals Chamber granted the Prosecutor's request for suspensive effect [REDACTED].<sup>13</sup>

11. On [REDACTED], the Appeals Chamber ordered the Registrar (i) to transmit a redacted version of the Document in Support of the Appeal to the Office of Public Counsel for the defence (hereinafter: "OPCD") and the Office of Public Counsel for victims (hereinafter: "OPCV"), and (ii) to request their submissions on the legal issue contained therein.<sup>14</sup>

12. On [REDACTED], the Registrar transmitted to the Appeals Chamber the "OPCD Submissions Pursuant to Regulation 77(4)(c)"<sup>15</sup> (hereinafter: "OPCD's Submissions") and the "OPCV Observations on the 'Redacted version of the Prosecution's appeal against the "Decision on a request for clarification by [REDACTED] concerning a cooperation request by the Court"'"<sup>16</sup> (hereinafter: "OPCV's Observations").<sup>17</sup>

13. On [REDACTED], the Appeals Chamber granted the Prosecutor's request for leave to file additional submissions on the significance of different linguistic versions of article 93 (1) (k) of the Statute,<sup>18</sup> and directed the OPCD and OPCV that they might, if deemed necessary, transmit to the Registrar submissions in response to the Prosecutor's additional submissions.<sup>19</sup>

14. On [REDACTED].<sup>20</sup>

15. On [REDACTED], the Prosecutor filed the "Prosecution's additional observation"<sup>21</sup> (hereinafter: "Prosecutor's Additional Observations").

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<sup>12</sup> Document in Support of the Appeal, [REDACTED].

<sup>13</sup> [REDACTED].

<sup>14</sup> [REDACTED].

<sup>15</sup> [REDACTED].

<sup>16</sup> [REDACTED].

<sup>17</sup> [REDACTED].

<sup>18</sup> [REDACTED].

<sup>19</sup> [REDACTED].

<sup>20</sup> [REDACTED].

16. On [REDACTED], the Registrar transmitted to the Appeals Chamber the “OPCD Observations in Response to the ‘Prosecution’s additional observation’”<sup>22</sup> (hereinafter: “OPCD’s Response to the Prosecutor’s Additional Observations”).<sup>23</sup>

### III. STANDARD OF REVIEW

17. The Prosecutor contends that the [REDACTED] Chamber erred in law in requiring a criminal nexus in relation to assets frozen under articles 57 (3) (e) and 93 (1) (k) of the Statute.<sup>24</sup> In respect of errors of law, the Appeals Chamber has repeatedly held that it “will not defer to the Trial (or Pre-Trial) Chamber’s legal interpretation, but ‘will arrive at its own conclusions as to the appropriate law and determine whether or not [that] Chamber misinterpreted the law’”.<sup>25</sup> The Appeals Chamber also recalls that “an appellant is not only obliged to set out an alleged error, ‘but also to indicate, with sufficient precision, how this error would have materially affected the impugned decision’”.<sup>26</sup>

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<sup>21</sup> [REDACTED].

<sup>22</sup> [REDACTED].

<sup>23</sup> [REDACTED].

<sup>24</sup> Document in Support of the Appeal, [REDACTED].

<sup>25</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, “Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 23 December 2014 entitled ‘Decision on “Defence Urgent Motion for Provisional Release”’, 20 May 2015, ICC-01/05-01/08-3249-Conf; a public redacted version was registered on the same date ([ICC-01/05-01/08-3249-Red](#)), para. 19; *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, “Judgment on the appeal of the Prosecutor against the decision of Trial Chamber IV of 12 September 2011 entitled ‘Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation’”, 17 February 2012, [ICC-02/05-03/09-295](#) (OA 2), para. 20; *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, “Judgment on the appeal of Mr Jean-Jacques Mangenda Kabongo against the decision of Pre-Trial Chamber II of 17 March 2014 entitled ‘Decision on the “Requête de mise en liberté” submitted by the Defence for Jean-Jacques Mangenda’”, 11 July 2014, [ICC-01/05-01/13-560](#) (OA 4), para. 26.

<sup>26</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, “Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 23 December 2014 entitled ‘Decision on “Defence Urgent Motion for Provisional Release”’, 20 May 2015, ICC-01/05-01/08-3249-Conf; a public redacted version was registered on the same date ([ICC-01/05-01/08-3249-Red](#)), para. 20; *The Prosecutor v. Jean-Pierre Bemba Gombo*, “Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 24 June 2010 entitled ‘Decision on the Admissibility and Abuse of Process Challenges’”, 19 October 2010, [ICC-01/05-01/08-962](#) (OA 3), para. 102, citing *The Prosecutor v. Joseph Kony et al.*, “Judgment on the appeal of the Defence against the ‘Decision on the admissibility of the case under article 19 (1) of the Statute’ of 10 March 2009”, 16 September 2009, [ICC-02/04-01/05-408](#) (OA 3), para. 48.

## IV. MERITS

### A. Relevant parts of the Impugned Decision

18. In the Impugned Decision, the [REDACTED] Chamber informed [REDACTED] that “the assets [REDACTED] do not fall within the [Court’s request for cooperation] and, accordingly, are not to be seized or frozen at the behest of the Court”.<sup>27</sup> The [REDACTED] Chamber stated that these assets were not to be seized or frozen because

there exists no reasonable basis to consider that these assets may have derived, directly or indirectly, to [REDACTED] from the crimes for which [REDACTED], or that any link may exist between these assets [REDACTED] and the crimes alleged [REDACTED].<sup>28</sup>

### B. Submissions of the parties and participants

#### 1. *Submissions of the Prosecutor*

19. The Prosecutor contends that the requirement of a criminal nexus in relation to assets frozen under articles 57 (3) (e) and 93 (1) (k) of the Statute is based on a misinterpretation of the Statute and amounts to an error of law materially affecting the Impugned Decision, requiring its reversal.<sup>29</sup>

20. Referring to article 31 (1) of the Vienna Convention on the Law of Treaties (hereinafter: “VCLT”), the Prosecutor avers that the ordinary meaning of articles 57 (3) (e) and 93 (1) (k) of the Statute, in their context and in the light of the object and purpose of the Statute, shows no requirement of a nexus between alleged crimes and an asset liable for freezing or seizure.<sup>30</sup> While the Prosecutor recognises that some terms in these two articles are “potentially ambiguous” in isolation, she submits that “an interpretation cannot be correct if it sacrifices the drafters’ intention demonstrated elsewhere through a treaty”.<sup>31</sup>

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<sup>27</sup> Impugned Decision, p. 6.

<sup>28</sup> Impugned Decision, para. 8.

<sup>29</sup> Document in Support of the Appeal, paras 4, 10.

<sup>30</sup> Document in Support of the Appeal, paras 8, 12-13, 17.

<sup>31</sup> Document in Support of the Appeal, para. 14.

21. The Prosecutor argues that a nexus between the crimes alleged and the relevant assets is not implied by the reference to “forfeiture” in these articles.<sup>32</sup> She submits that a narrow interpretation of the word “forfeiture” in articles 57 (3) (e) and 93 (1) (k) of the Statute is inconsistent with the word’s ordinary meaning in the context of the relevant provisions.<sup>33</sup> The Prosecutor contends that “nothing in article 57(3)(e) suggests that the word ‘forfeiture’ in that context carries the same meaning as that in article 77 (2) (b)” of the Statute.<sup>34</sup>

22. The Prosecutor observes that article 57 (3) (e) of the Statute specifies that the protective measures referred to therein should be exercised “in particular for the ultimate benefit of victims” and argues that “a broad reading of the term ‘forfeiture’ would enable the Court to give effect to the stipulation in article 57(3)(e) that protective measures should be used ‘in particular for the ultimate benefit of victims’ by enabling a suspect’s assets to be secured to meet potential reparation awards, as well as fines and forfeitures in the meaning of article 77(2)”.<sup>35</sup> The Prosecutor submits that this broad interpretation of forfeiture is consistent with academic commentary,<sup>36</sup> resolutions of the Assembly of States Parties (hereinafter: “ASP”),<sup>37</sup> and jurisprudence of the Court.<sup>38</sup>

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<sup>32</sup> Document in Support of the Appeal, para. 17.

<sup>33</sup> Document in Support of the Appeal, para. 18.

<sup>34</sup> Document in Support of the Appeal, paras 19-20.

<sup>35</sup> Document in Support of the Appeal, para. 24.

<sup>36</sup> Document in Support of the Appeal, para. 27 referring to C. Kress and K. Prost, “Article 93: Other forms of cooperation”, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article* (Beck et al., 2<sup>nd</sup> ed., 2008), pp. 1578-1579; F. Guariglia, K. Harris, G. Hochmayr, “Article 57: Functions and powers of the Pre-Trial Chamber”, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article* (Beck et al., 2<sup>nd</sup> ed., 2008), p. 1130.

<sup>37</sup> Document in Support of the Appeal, para. 26 referring to ASP, Resolution ICC-ASP/10/Res.3, 20 December 2011, available at [https://www.icc-cpi.int/iccdocs/asp\\_docs/ASP10/Resolutions/ICC-ASP-10-Res.3-ENG.pdf](https://www.icc-cpi.int/iccdocs/asp_docs/ASP10/Resolutions/ICC-ASP-10-Res.3-ENG.pdf), para. 3; ASP, Resolution ICC-ASP/13/Res.4, 17 December 2014, available at [https://www.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/ASP13/ICC-ASP-13-Res4-ENG.pdf](https://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP13/ICC-ASP-13-Res4-ENG.pdf), para. 10; ASP, Resolution ICC-ASP/12/Res.5, 27 November 2013, available at [https://www.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/ASP12/ICC-ASP-12-Res5-ENG.pdf](https://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP12/ICC-ASP-12-Res5-ENG.pdf), para. 10; ASP, Resolution ICC-ASP/11/Res.7, 21 November 2012, available at [https://www.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/ASP11/ICC-ASP-11-Res7-ENG.pdf](https://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP11/ICC-ASP-11-Res7-ENG.pdf), para. 11.

<sup>38</sup> Document in Support of the Appeal, paras 25-27 referring to, *inter alia*, Pre-Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, “Decision concerning Pre-Trial Chamber I’s Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr Thomas Lubanga Dyilo”, 24 February 2006, [ICC-01/04-01/06-8-Corr](https://www.icc-cpi.int/iccdocs/asp_docs/ASP10/Resolutions/ICC-ASP-10-Res.3-ENG.pdf) (hereinafter: “*Lubanga* Pre-Trial Chamber’s Decision on Freezing of Assets”), para. 135. This document was originally filed under seal but was reclassified as public pursuant to the “Decision to unseal the warrant of arrest against Mr Thomas Lubanga Dyilo and related documents”, 17 March 2006, [ICC-01/04-01/06-37](https://www.icc-cpi.int/iccdocs/asp_docs/ASP10/Resolutions/ICC-ASP-10-Res.3-ENG.pdf); Trial Chamber



23. The Prosecutor argues that rule 99 of the Rules of Procedure and Evidence is located in subsection 4 of the Rules entitled “Reparations to victims” and that it appears to confer standing on victims seeking reparations to seek protective measures not only from the Trial Chamber under article 75 (4) of the Statute, but also from the Pre-Trial Chamber under article 57 (3) (e) of the Statute.<sup>39</sup> The Prosecutor also argues that article 75 (4) of the Statute, which states that the Court may determine whether for purposes of reparations it is necessary to seek measures under article 93 (1) of the Statute, “does not favour a narrow reading of “forfeiture” in article 57(3)(e).<sup>40</sup>

24. The Prosecutor contends that “a suspect or accused person will not be unfairly prejudiced” by a broad interpretation of forfeiture in articles 57 (3) (e) and 93 (1) (k) of the Statute, as the former provision “contains the guarantee that protective measures may only be ordered ‘having due regard to the strength of the evidence and the rights of the parties concerned’”.<sup>41</sup>

25. As regards the notion of “property and assets”, while acknowledging that “the syntax of article 93(1)(k) is awkward”, the Prosecutor submits that, consistent with the ordinary meaning, the “property and assets” referred to in that provision are those of a person, not of crimes.<sup>42</sup> The Prosecutor contends that “a reading of article 93(1)(k) which limited its application only to assets with a criminal nexus would significantly limit its utility for the purpose of reparations” under article 75 (4) of the Statute.<sup>43</sup>

26. The Prosecutor contends that the broad interpretation of articles 57 (3) (e) and 93 (1) (k) of the Statute is further supported by the object and purpose of the Statute,

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V(B), *The Prosecutor v. Uhuru Muigai Kenyatta*, “Decision on the implementation of the request to freeze assets”, 8 July 2014, [ICC-01/09-02/11-931](#) (hereinafter: “*Kenyatta* Trial Chamber’s Decision on Freezing of Assets”), para. 13. This document was originally filed as confidential but was reclassified as public pursuant to “Order concerning the public disclosure of confidential information” 21 October 2015, [ICC-01/09-02/11-967](#); Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, “Judgment on the appeals against the ‘Decision establishing the principles and procedures to be applied to reparations’ of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2”, 3 March 2015, [ICC-01/04-01/06-3129](#) (A A2 A3), para. 103; Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, “Decision establishing the principles and procedures to be applied to reparations”, 7 August 2012, [ICC-01/04-01/06-2904](#), paras 276-277.

<sup>39</sup> Document in Support of the Appeal, para. 28.

<sup>40</sup> Document in Support of the Appeal, paras 29-31.

<sup>41</sup> Document in Support of the Appeal, para. 32.

<sup>42</sup> Document in Support of the Appeal, paras 33-34.

<sup>43</sup> Document in Support of the Appeal, para. 35.

which includes the “provision of effective remedies for victims including through a system of reparations”.<sup>44</sup> Referring to the Court’s jurisprudence, the Prosecutor submits that “early and effective measures to freeze a suspect’s assets are ‘a necessary tool’ to ensure that a reparations award may ultimately be enforced”.<sup>45</sup>

27. In the Prosecutor’s Additional Observations, she notes that the six equally authoritative language versions of the Statute differ in their formulation of article 93 (1) (k) of the Statute.<sup>46</sup> The Prosecutor argues:

Notwithstanding any linguistic differences, article 93(1)(k) should not be read to impose any requirement for a criminal nexus. Such a requirement is contradicted by the drafting history of the Statute, as well as being inconsistent with article 93(1)(k)’s context and the Statute’s object and purpose as a whole.<sup>47</sup>

28. The Prosecutor contends that where linguistic differences occur, article 33 (4) of the VCLT provides that “the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted”.<sup>48</sup> She refers to academic commentary supporting the view that if a “treaty was negotiated and drafted in only one of the authentic languages, it is natural to place more reliance on that text, particularly if it is unambiguous”.<sup>49</sup> The Prosecutor asserts that the English language version of article 93 (1) (k) of the Statute remained unchanged throughout the negotiations from its introduction in the Preparatory Committee’s December 1997 draft.<sup>50</sup>

## 2. *Submissions of the OPCD*

29. The OPCD submits that “assets subject to a Chamber’s order and request for cooperation under [a]rticles 57(3)(e) and 93(1)(k) of the Statute **must** be derived from or otherwise linked to alleged crimes within the jurisdiction of the Court”.<sup>51</sup> It argues that such an interpretation is supported by “the practice of the *ad hoc* Tribunals,

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<sup>44</sup> Document in Support of the Appeal, para. 36.

<sup>45</sup> Document in Support of the Appeal, para. 38 referring *inter alia* to [Lubanga Pre-Trial Chamber’s Decision on Freezing of Assets](#), para. 136.

<sup>46</sup> Prosecutor’s Additional Observations, para. 5.

<sup>47</sup> Prosecutor’s Additional Observations, para. 2.

<sup>48</sup> Prosecutor’s Additional Observations, para. 6.

<sup>49</sup> Prosecutor’s Additional Observations, para. 7 referring to A. Aust, *Modern Treaty Law and Practice* (Cambridge University Press, 2000), pp. 205-206.

<sup>50</sup> Prosecutor’s Additional Observations, para. 9.

<sup>51</sup> OPCD’s Submissions, para. 8 (emphasis in original).

[which] seems to have consistently required a link between forfeiture of property and the alleged crime” and the domestic implementing legislation of a number of States Parties to the Statute, which “shows the necessity of a nexus between forfeiture of assets and the alleged crimes”.<sup>52</sup> It also contends that the necessity of a nexus between forfeiture of assets and the alleged crimes is in line with Judge Geoffrey Henderson’s dissent to the decision of Trial Chamber V(B) in the case of *Prosecutor v. Uhuru Muigai Kenyatta* and the opinion of various academics.<sup>53</sup>

30. Article 57 (3) (e) of the Statute specifically requires “due regard to the strength of the evidence and the rights of the parties concerned”, which, in the view of the OPCD, indicates that the measures set out in this provision should be taken “in context of – and with a nexus to – the crimes of the arrest warrant or summons and with full respect for the presumption of innocence”.<sup>54</sup> The OPCD submits that the drafters’ intention that such a nexus would be required can also be drawn from the wording of article 93 (1) (k) of the Statute, which “specifically requires that all actions taken pursuant to that provision ‘identification, tracing and freezing or seizure’ be ‘of crimes’ [...]”.<sup>55</sup>

31. The OPCD further notes that the Prosecutor “agrees that ‘the six [equally authoritative] versions [of article 93(1)(k)] do vary, to some extent, both in their particular wording and the grammatical constructions used’” and argues that “any such discrepancy should be decided in favour of a suspect or accused”.<sup>56</sup>

### 3. Submissions of the OPCV

32. The OPCV emphasises that the issue of “seizure and freezing of assets is of paramount importance to the interests of victims”.<sup>57</sup> It argues that “a restrictive

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<sup>52</sup> OPCD’s Submissions, paras 14-26.

<sup>53</sup> OPCD’s Submissions, paras 9-12 referring to R. E. Fife, “Article 77. Applicable Penalties”, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article* (Beck et al., 2<sup>nd</sup> ed., 2008), p. 1430; M. Galvis Martínez, “Forfeiture of Assets at the International Criminal Court. The Short Arm of International Criminal Justice”, 12 *Journal of International Criminal Justice* (2014), p. 14; “Dissenting Opinion of Judge Henderson”, dated 8 July 2014 and registered on 9 July 2014, ICC-01/09-02/11-931-Anx, para. 2. The document was originally filed confidentially but was reclassified as public pursuant to the order of Trial Chamber V(B), 21 October 2014, ICC-01/09-02/11-967.

<sup>54</sup> OPCD’s Submissions, para. 27.

<sup>55</sup> OPCD’s Submissions, para. 27.

<sup>56</sup> OPCD’s Response to the Prosecutor’s Additional Observations, paras 3-4.

<sup>57</sup> OPCV’s Observations, para. 5.

approach as to the assets and property of the suspect, accused or convicted person that could be eventually used in the reparation phase, would [...] frustrate the very purpose of reparations”.<sup>58</sup> It submits that “property and assets respectively seized and frozen under articles 57(3)(e) and 93(1)(k) of the Rome Statute, need not be in any way linked to the crimes allegedly committed or found to be committed by the suspect, accused or convicted person”.<sup>59</sup>

33. The OPCV distinguishes two kinds of forfeiture, one for the purpose of a penalty under article 77 (2) (b) of the Statute and the other for the purpose of reparations pursuant to article 75 (2) of the Statute.<sup>60</sup> In this regard, it notes that the term “forfeiture” in article 77 (2) (b) of the Statute “exclusively relates to forfeiture of proceeds, property and assets derived directly or indirectly from the crime”.<sup>61</sup> It contends that the “indication in article 57(3)(e) of the [...] Statute that forfeiture is ‘in particular for the ultimate benefit of victims’ suggests that it actually relates to reparations pursuant to article 75(2) of the [...] Statute”.<sup>62</sup> It argues that the difference in nature between fines and forfeiture orders and reparations orders is “confirmed by the cross-reference to article 109 contained in paragraph 5 of article 75, according to which: ‘[a] State Party shall give effect to a decision under this article *as if* the provisions of article 109 [relevant to enforcement of fines and forfeiture measures] were applicable to this article’” (emphasis added).<sup>63</sup>

34. The OPCV contends that its position is supported by the jurisprudence of the Court and an examination of the drafting history of the Statute. It refers to relevant decisions of Pre-Trial and Trial Chambers to demonstrate that the term “forfeiture” contained in article 57 (3) (e) of the Statute has been interpreted broadly and that no nexus with the alleged crime has been required.<sup>64</sup> Regarding the drafting history, the

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<sup>58</sup> OPCV’s Observations, para. 7.

<sup>59</sup> OPCV’s Observations, para. 8.

<sup>60</sup> OPCV’s Observations, paras 12-13.

<sup>61</sup> OPCV’s Observations, para. 10.

<sup>62</sup> OPCV’s Observations, para. 12.

<sup>63</sup> OPCV’s Observations, paras 12-13.

<sup>64</sup> OPCV’s Observations, paras 14-15 referring to [Kenyatta Trial Chamber’s Decision on Freezing of Assets](#), para. 16; [Lubanga Pre-Trial Chamber’s Decision on Freezing of Assets](#), paras 134-137, p. 64; Pre-Trial Chamber I, *The Prosecutor v. Germain Katanga*, “Order on the execution of the warrant of arrest against Germain Katanga”, dated 5 November 2007 and registered on 10 January 2008, [ICC-01/04-01/07-54-tENG](#), p. 5; original French version, 5 November 2007 ([ICC-01/04-01/07-54](#)); Pre-Trial Chamber II, *The Prosecutor v. Jean-Pierre Bemba Gombo*, “Décision et demande en vue

OPCV admits that, at the commencement of the negotiations on the matter, the International Law Commission (hereinafter: “ILC”) “did require the existence of a nexus between the commission of the crimes and the forfeiture of the concerned person’s properties” in its Draft Statute of the International Criminal Court of 1993.<sup>65</sup> However, it notes that the ILC dropped this proposal in the Draft Statute of 1994, and that, during the Preparatory Committee stage, when the question was raised again, and at the Rome Conference, reference to any such nexus was deliberately removed from the relevant provisions, in particular articles 57 (3) (e) and 93 (1) (k) of the Statute.<sup>66</sup>

### C. Determination by the Appeals Chamber

35. The issue on appeal is “[w]hether assets subject to a Chamber’s order and request for cooperation under articles 57(3)(e) and 93(1)(k) of the Statute must be

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d’obtenir l’identification, la localisation, le gel et la saisie des biens et avoirs adressées à la République portugaise”, 27 May 2008, [ICC-01/05-01/08-8](#), paras 5-7 This document was reclassified as public pursuant to the “Decision on the Second Defence’s Application for Lifting the Seizure of Assets and Request for Cooperation to the Competent Authorities of the Republic of Portugal”, 14 November 2008, [ICC-01/05-01/08-249](#).

<sup>65</sup> OPCV’s Observations, paras 16, 18-19 referring to the “Report of the Working Group on a Draft Statute for an International Criminal Court” annexed to the “Report of the Commission to the General Assembly on the work of its forty-fifth session” in *Yearbook of the International Law Commission*, Vol. II, Part II (1993), p. 100, at p. 125.

<sup>66</sup> OPCV’s Observations, paras 17, 20-34 referring to “Draft Statute for an International Criminal Court with commentaries”, in the “Report of the International Law Commission on the work of its forty-sixth session, 2 May - 22 July 1994”, *Yearbook of the International Law Commission*, Vol. II, Part II (1994), p. 60; [Compilation of proposals on judicial cooperation and enforcement submitted to August 1996 phase of the Preparatory Committee on the Establishment of an International Criminal Court](#), 27 August 1996, A/AC.249/CRP.17, p. 62; Working Group on Compliance with Requests by the Court, [Annex III. Working Paper prepared by interested delegations regarding Part 7 \(International Cooperation and Judicial Assistance\)](#), excerpted from *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, Volume II, 13 September 1996, Supplement A/51/22, p. 309; Preparatory Committee on the Establishment of an International Criminal Court: Working Group on General Principles of Criminal Law and Penalties, [Chairman’s Text](#), 13 February 1997, A/AC.249/1997/WG.2/CRP.2, p. 1; United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, [Report of the Preparatory Committee on the Establishment of an International Criminal Court, Addendum, Part I, Draft Statute for the International Criminal Court](#), A/CONF.183/2/Add.1, 14 April 1998, p. 49; Working Group on International Cooperation and Judicial Assistance, [Rolling Text of articles 87, 90, 90 ter and 90 quater](#), 6 July 1998, A/CONF.183/C.1/WGIC/L.15; Preparatory Committee on the Establishment of an International Criminal Court, [Text of the Draft Statute for the International Criminal Court](#), 1 April 1998, A/AC.249/1998/CRP.15; United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, [Report of the Working Group on Penalties](#), 4 July 1998, A/CONF.183/C.1/WGP/L.14 [incorporating documents A/CONF.183/C.1/WGP/L.14/Corr.1 and Corr.2 of 6 July 1998 and Add.1 of 7 July 1998 and Add.1/Corr.1 of 8 July 1998, Add.2 of 9 July 1998 and Add.3/Rev.1 of 17 July 1998] pp.2-4; F. Guariglia, K. Harris and G. Hochmayr, “Article 57: Functions and Powers of the Pre-Trial Chamber”, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article* (Beck et al., 2<sup>nd</sup> ed., 2008), p. 1130.

derived from or otherwise linked to alleged crimes within the jurisdiction of the Court”.<sup>67</sup>

*1. Relevant legal provisions*

36. Article 57 (3) of the Statute provides in relevant part:

In addition to its other functions under this Statute, the Pre-Trial Chamber may:

[...]

(e) Where a warrant of arrest or a summons has been issued under article 58, and having due regard to the strength of the evidence and the rights of the parties concerned, as provided for in this Statute and the Rules of Procedure and Evidence, seek the cooperation of States pursuant to article 93, paragraph 1 (k), to take protective measures for the purpose of forfeiture, in particular for the ultimate benefit of victims.

37. Article 93 (1) of the Statute provides in relevant part:

States Parties shall, in accordance with the provisions of [Part IX “International cooperation and judicial assistance”] and under procedures of national law, comply with requests by the Court to provide the following assistance in relation to investigations or prosecutions:

[...]

(k) The identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties;

38. Article 77 (2) of the Statute provides in relevant part:

In addition to imprisonment, the Court may order:

[...]

(b) A forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties.

39. Article 79 (1) and (2) of the Statute provides:

1. A Trust Fund shall be established by decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims.

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<sup>67</sup> Request for Leave to Appeal, para. 4; Decision on Request for Leave to Appeal, paras 3, 10.

2. The Court may order money and other property collected through fines or forfeiture to be transferred, by order of the Court, to the Trust Fund.

40. Rule 99 (1) of the Rules of Procedure and Evidence, under the heading “Cooperation and protective measures for the purpose of forfeiture under articles 57, paragraph 3 (e), and 75, paragraph 4”, provides:

The Pre-Trial Chamber, pursuant to article 57, paragraph 3 (e), or the Trial Chamber, pursuant to article 75, paragraph 4, may, on its own motion or on the application of the Prosecutor or at the request of the victims or their legal representatives who have made a request for reparations or who have given a written undertaking to do so, determine whether measures should be requested.

2. *Interpretation of the relevant provisions in context*

(a) **“Proceeds, property and assets and instrumentalities of crimes”**

41. The protective measures referred to in article 57 (3) (e) of the Statute are, pursuant to article 93 (1) (k), “the identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes, without prejudice to the rights of bona fide third parties”. The Appeals Chamber considers that it is clear from the use of the word “instrumentalities” that this object must be linked with crimes. The word “proceeds” may be capable of an independent meaning equivalent to “revenues”, “income” or “profits”, nonetheless, in context, the Appeals Chamber considers its use in article 93 (1) (k) to be most readily associated with crimes. However, the Appeals Chamber does not find any express or otherwise apparent reference to such link with respect to the phrase “property and assets”.

42. In this regard, the Appeals Chamber notes the difference in wording between articles 93 (1) (k) and 77 (2) (b) of the Statute. The “property and assets” which are the subject of the penalty of forfeiture under article 77 (2) (b) of the Statute, must be “derived directly or indirectly from [a] crime [referred to in article 5 of the Statute of which the person has been convicted]”. By contrast, a requirement that “property and assets” be derived from a crime is not clearly expressed in article 93 (1) (k) of the Statute.

43. The Appeals Chamber further notes that the punctuation of the phrase in article 93 (1) (k) of the Statute differs from that of article 77 (2) (b) of the Statute. While article 77 (2) (b) of the Statute separates with commas all types of property which

must be derived from a crime and uses the conjunction “and” only before the last type of such property, article 93 (1) (k) of the Statute uses the conjunction “and” both between the words “property” and “assets”, and before the words “instrumentalities of crimes”. In addition, the Appeals Chamber considers that the words “of crimes” at the end of the phrase do not modify the terms “property” and “assets”. Indeed, one cannot speak of “property of crimes” or “assets of crimes”. Based on the foregoing, the Appeals Chamber finds that the words “of crimes” in article 93 (1) (k) of the Statute thus refer to “instrumentalities” and not to “property and assets”.

**(b) “For the purpose of forfeiture”**

44. The Appeals Chamber notes the arguments that have been raised in the context of the present appeal that the requirement of nexus with crimes may be derived from the purpose of the protective measures under article 57 (3) (e) of the Statute, which, it is submitted, is limited to the penalty of forfeiture set out in article 77 (2) (b) of the Statute. As just indicated, forfeiture under article 77 (2) (b) concerns property “derived directly or indirectly from [the] crime”.

45. However, the Appeals Chamber is of the view that “the purpose of forfeiture” referred to in article 57 (3) (e) of the Statute does not refer only to the penalty of forfeiture under article 77 (2) (b) of the Statute, but incorporates other types of forfeiture envisaged by the Statute and the Rules of Procedure and Evidence. The Appeals Chamber notes in this regard that while the word “forfeiture” is not defined in the Statute or Rules of Procedure and Evidence, it is used consistently across the statutory framework to mean the deprivation of property. In the context of article 77 (2) (b) of the Statute, forfeiture is a penalty. However, as is apparent from rule 99 of the Rules of Procedure and Evidence, property may also be forfeited for the purpose of reparations pursuant to article 75 of the Statute. Rule 99 of the Rules of Procedure and Evidence, appearing in the subsection entitled “Reparations to victims”, refers to “[c]ooperation and protective measures for the purpose of forfeiture under [*inter alia*, article] 75, paragraph 4”. It must also be noted that rule 99 (1) of the Rules of Procedure and Evidence specifically refers to protective measures under article 57 (3) (e) of the Statute.

46. Thus, the Appeals Chamber considers that rule 99 of the Rules of Procedure and Evidence clarifies that the purpose of the protective measures set out in article 57 (3)



(e) of the Statute is not only the penalty of forfeiture under article 77 (2) (b) of the Statute; such protective measures may also be taken in relation to a potential reparations order.

47. The Appeals Chamber also notes that protective measures under article 57 (3) (e) of the Statute may be requested “[w]here a warrant of arrest or a summons has been issued under article 58”. At that stage of proceedings, it may be difficult to determine which property and assets were “derived directly or indirectly from [the] crime” for the purpose of giving effect to a future penalty of forfeiture that may be imposed. Accordingly, the Appeals Chamber considers that an interpretation of articles 57 (3) (e) and 93 (1) (k) of the Statute whereby the property and assets need not be derived from crime is consistent with the limitations inherent at this stage of the proceedings.

48. Furthermore, having regard to (i) the above-mentioned difficulty in determining a link with crime at early stages of the proceedings, and (ii) the fact that requests for cooperation concerning property and assets are directed to the authorities of States Parties that may have a limited knowledge of the charges against the suspect, the Appeals Chamber is of the view that, had the drafters intended that “property and assets” under article 93 (1) (k) of the Statute be derived from crime, a procedure before the Court would have been put in place for the specific purpose of determining the link between the property and assets and the crimes alleged. The absence of a specific procedure for determining the link between property and assets which may be the subject of the protective measures and the crimes charged in response to potential enquiries by States Parties is notable. The Appeals Chamber considers that this implies that no such link is required.

**(c) “For the ultimate benefit of victims”**

49. The Appeals Chamber further notes that protective measures under article 57 (3) (e) of the Statute must be taken “in particular for the ultimate benefit of victims” and considers that this indication is consistent with the view that such measures may be taken in relation to a potential reparations order.

50. The Appeals Chamber notes that many legal systems provide for the possibility of claiming compensation for injuries resulting from crime. In some systems a civil

claim for compensation may be examined within the criminal proceedings.<sup>68</sup> In other systems, such claims may be examined in civil proceedings either separate from or linked to the criminal proceedings.<sup>69</sup> In either type of procedure, the victim has the opportunity to claim compensation and protective measures may be ordered, including at early stages of the proceedings, to secure the potential payment of compensation.<sup>70</sup> If the narrow interpretation of articles 57 (3) (e) and 93 (1) (k) of the Statute were to be adopted, whereby protective measures could only be taken for the purpose of forfeiture as a penalty under article 77 (2) (b) of the Statute, victims would be unable to obtain protective measures for potential reparations at early stages of the proceedings. The position of victims of crimes prosecuted by the Court would thus significantly differ from that of victims of crimes adjudicated domestically. In the

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<sup>68</sup> See, for example, article 46 § 1 of the Polish Criminal Code (“In the event of conviction the court may impose, and upon a request of the injured person shall impose, pursuant to provisions of the civil law, the obligation to redress, in whole or in part, the damage caused by the crime or to compensate for the suffered harm [...]” [unofficial translation]) and article 49a of the Polish Code of Criminal Procedure (“The injured person [...] may, until the conclusion of the hearing of evidence at trial, file a request, referred to in art. 46 § 1 of the Criminal Code” [unofficial translation]); article 3 of the French Code of Criminal Procedure (“The civil action may be exercised at the same time as the public prosecution and before the same court” [unofficial translation]).

<sup>69</sup> See, for example, article 109 of the Spanish Criminal Code (“The commission of a crime entails the obligation to make reparation, in the terms provided by law, of the damages that were caused. The aggrieved party may choose, in any case, to seek to establish civil responsibility before the civil courts” [unofficial translation]).

<sup>70</sup> See, for example, article 233 (1) of the Spanish Code of Criminal Procedure (“Preventive measures aimed at guaranteeing civil liability shall seek to ensure that responsibilities arising from civil actions against the defendant and affected third parties can be discharged” [unofficial translation]); article 518 of the Argentinean Code of Criminal Procedure (“At the confirmation of charges, the judge will order the confiscation of property of the accused or, where applicable, the civil defendant, sufficient to ensure the amount of the criminal financial penalty, the civil damages and costs” [unofficial translation]); article 706-103 of the French Code of Criminal Procedure (“Where an investigation into one of the offences within the scope of article 706-73 and 706-74 has been opened, and in order to guarantee the payment of the fines incurred as well as, where applicable, the compensation of the victims and the execution of any confiscation measures, the liberty and custody judge, at the request of the district prosecutor, may order protective measures to be taken over the assets, movable or immovable, owned jointly or severally, of the person under judicial examination. The expense of this is advanced by the Treasury and it takes place in accordance with the rules concerning execution in civil proceedings. Conviction validates any temporary seizures, and makes the registration of sureties final” [unofficial translation]; see also article 706-166 of the French Code of Criminal Procedure); article 291 § 1 of the Polish Code of Criminal Procedure (“In the event that the accused is charged with an offence for which a fine or monetary payment may be imposed, or in relation to which forfeiture or compensation may be ordered, the execution of the judgment may be *proprio motu* secured with respect to property of the accused or property to which article 45 § 2 of the Criminal Code refers [property of which the ownership or another title the perpetrator acquired during the time the crime was committed], where there is a reasonable suspicion that without such a measure the execution of the judgment in its part imposing the indicated penalty, monetary payment, forfeiture or compensation will be impossible or significantly impeded” [unofficial translation]). The Mareva injunction may be seen as fulfilling a similar function in certain common law jurisdictions. See England and Wales, Court of Appeal, Civil Division, *Mareva Compania Naviera SA v. International Bulkcarriers SA*, 23 June 1975, [1980] 1 All ER 213.

view of the Appeals Chamber, such an interpretation of the Statute would produce an unreasonable result.

**(d) Reliance on article 93 (1) (k) of the Statute after conviction in relation to reparations awards under article 75 (4) of the Statute**

51. The Appeals Chamber notes that article 75 (4) of the Statute provides that “the Court may, after a person is convicted of a crime within the jurisdiction of the Court, determine whether, in order to give effect to an order which it may make under this article, it is necessary to seek measures under article 93, paragraph 1”.

52. The Appeals Chamber further notes that if “property and assets” under article 93 (1) (k) of the Statute were interpreted as limited to property derived from crime, the Court would be unable to rely on this provision to request the States’ cooperation to implement protective measures for the purpose of reparations *after* conviction. Therefore, when seeking cooperation in respect of property other than that derived from crime, the Court would have to rely on article 93 (1) (l) of the Statute, pursuant to which the Court may request “[a]ny other type of assistance”. The Appeals Chamber, however, finds this provision to be too general for the purpose. The absence of a provision providing specifically for cooperation with respect to “the identification, tracing and freezing or seizure” of property and assets not derived from crime post-conviction lends further support to the view that article 93 (1) (k) of the Statute must be interpreted broadly. Only a broad interpretation would allow the Court to rely on article 93 (1) (k) of the Statute in relation to reparations after the person has been convicted.

*3. Object and purpose of the Statute*

53. Pursuant to article 31 (1) of the VCLT, a treaty shall be interpreted, *inter alia*, in the light of its object and purpose. The Appeals Chamber is of the view that efficient protective measures taken at early stages of proceedings increase the likelihood that property and assets will be available for the purpose of reparations at the time any such award is made pursuant to article 75 of the Statute. Ensuring the availability of effective protective measures in relation to property and assets of the suspect or accused under article 57 (3) (e) of the Statute is consistent with the object and purpose of the Statute. Indeed, reparations to victims are a prominent feature of the Statute, distinguishing the Court from, for instance, the International Criminal Tribunal for the

Former Yugoslavia, the International Criminal Tribunal for Rwanda or the Special Court for Sierra Leone, whose Rules of Procedure and Evidence indicate that compensation for injury caused by the crime may only be claimed “in a national court or other competent body”.<sup>71</sup> In contrast, the Appeals Chamber notes that the remedies available to victims under the Statute and the Rules of Procedure and Evidence are far more elaborate. Victims may claim reparations directly before the Court, under rule 94 of the Rules of Procedure and Evidence. Pursuant to article 75 of the Statute, reparations are awarded by the Court, rather than national courts or other competent bodies. There is also an enforcement mechanism with respect to orders for reparations, involving cooperation of States Parties, under article 75 (4) in conjunction with article 109 of the Statute. The Appeals Chamber considers that an interpretation of the Statute that brings the property and assets of the suspect or accused person that will be potentially subject to reparations orders in the event of conviction within the scope of protective measures under articles 57 (3) (e) and 93 (1) (k) of the Statute consolidates the effectiveness of the reparations system and is thus consistent with the object and purpose of the Statute. It is additionally noted that the freezing of assets constitutes a provisional protective measure which must be applied in a manner consistent with article 21 (3) of the Statute.

#### 4. *Comparison of authentic texts*

54. The Appeals Chamber notes that the Prosecutor,<sup>72</sup> the OPCD<sup>73</sup> and the OPCV<sup>74</sup> refer to the variations between the texts of the different language versions of the Statute. Article 128 of the Statute provides that the Arabic, Chinese, English, French, Russian and Spanish texts of the Statute are equally authentic.

55. Article 33 (4) of the VCLT provides that:

Except where a particular text prevails [...], when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

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<sup>71</sup> ICTY Rules of Procedure and Evidence, Rule 106 (B); ICTR Rules of Procedure and Evidence, Rule 106 (B); SCSL Rules of Procedure and Evidence, Rule 105 (B).

<sup>72</sup> Prosecutor’s Additional Observations, paras 2, 5.

<sup>73</sup> OPCD’s Submissions, para. 10, footnote 9.

<sup>74</sup> OPCV’s Observations, para. 31.

56. As the Prosecutor has suggested,<sup>75</sup> the ordinary rules of interpretation under article 31 of the VCLT remain the starting point in the analysis of the authentic texts. As discussed earlier, the application of article 31 of the VCLT is sufficient for the purpose of interpreting the English text of articles 57 (3) (e) and 93 (1) (k) of the Statute. However, as will be shown, a comparison with other texts of the Statute discloses variations in meaning.

57. Article 33 (3) of the VCLT contains a presumption that the terms of a treaty have the same meaning in each authentic text. The ILC has indicated that this “requires that every effort should be made to find a common meaning for the texts before preferring one to another”.<sup>76</sup> If this attempt at harmonisation fails, the next recourse lies in the supplementary means of interpretation under article 32 of the VCLT, including the preparatory work of the treaty and the circumstances of its conclusion. If a common meaning cannot be derived from the different language versions of the treaty following this process, “the meaning which best reconciles the texts, having regard to the object and purpose of the treaty” must be adopted.<sup>77</sup>

58. The Appeals Chamber notes that the French and Spanish versions of the Statute require a link between all four categories of objects listed in article 93 (1) (k) and the alleged crimes. A literal translation into English of the French “*produit des crimes, des biens, des avoirs et des instruments qui sont liés aux crimes*” would be the “proceeds of crime, property, assets and instruments that are linked to the crimes”. A translation of the Spanish “*producto y los bienes y haberes obtenidos del crimen y de los instrumentos del crimen*” would read as the “proceeds and the property and assets obtained from crime and the instruments of crime”.

59. The Arabic text of the relevant phrase appears to be closer to the English text. It reads as “proceeds and properties and instruments related to crimes” and it is not immediately clear whether “related to crimes” refers to “instruments” only, or to all that precedes the “instruments”.

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<sup>75</sup> Prosecutor’s Additional Observations, para. 6.

<sup>76</sup> United Nations, *Yearbook of the International Law Commission*, Volume II, 1966, A/CN.4/SER.A/1966/Add.1, p. 225, para. 7.

<sup>77</sup> R. Gardiner, *Treaty Interpretation*, (Oxford University Press, 2008), pp. 363, 380-384.

60. The Chinese and Russian texts have yet another meaning. In the Chinese text, while the words “proceeds” and “instrumentalities of crimes”, by their definition, are connected to the crimes charged, the words “property and assets” require no link with such crimes. An English translation of the Russian text reads as “proceeds, property and income, and also tools of crimes for the purpose of subsequent confiscation”. The conjunction “and also” appears to distinguish “tools”, which are related to crimes, from “proceeds, property and income”, for which such relation is not expressly required.

61. In view of the foregoing, the various texts, interpreted “in good faith in accordance with the ordinary meaning”, pursuant to 31 (1) of the VCLT, are not consistent regarding the requirement of a link between “property and assets” and crimes: (i) the French and Spanish texts expressly require the link; (ii) the Arabic and English texts do not contain such an express requirement, but there may be some ambiguity, which, as discussed earlier, is resolved, at least with respect to the English text, by the application of article 31 of the VCLT; and (iii) the Chinese and Russian texts do not require the link. The differences are so significant that it is difficult to arrive at a common understanding of the texts. In accordance with the above-stated rules of interpretation, recourse may be had to supplementary means of interpretation, including the preparatory work of the Statute and the circumstances of its conclusion.

62. The Appeals Chamber, however, notes that the preparatory work of the Statute does not clearly show which interpretation was intended,<sup>78</sup> and that the difference of

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<sup>78</sup> The Appeals Chamber notes that some elements of the preparatory work may be taken to support the view that the drafters intended the “property and assets” not to be limited to those linked to crimes. For instance, the earliest versions of the current article 57 (3) (e) of Statute relating to the protective measure of freezing of property (September 1996), expressly indicated that this measure related to a future award of compensation to victims. The April 1998 draft included an indication that the provision on protective measures should be reviewed in the light of the newly drafted provision on reparations (*Report of the Preparatory Committee on the Establishment of an International Criminal Court*, 14 April 1998, A/CONF. 183/2/Add.1 p. 121). The protective measure at that stage was thus meant to relate to reparations. Furthermore, a footnote to the 4 July 1998 version of article 57 (3) (e) points to “[t]he close connection” between the new proposal and the provisions on reparations (United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Report of the Working Group on Procedural Matters*, 1 July 1998, A/Conf.183/13 (Vol.III) incorporating A/CONF.183/C.1AVGPM/L.40, p. 276). In addition, it is noted that a footnote to the April 1998 version of article 75 dealing specifically with reparations, with the Court’s power to order protective measures for that purpose, set out in article 90 paragraph 1 (which became the eventual article 93 (1)), states that “the view was expressed that it would be necessary to clarify whether the property and assets referred to in that article includes both crime and non-crime related property and

meaning between the different language texts of the Statute cannot, therefore, be resolved by resort to this supplementary means of interpretation. Consequently, if recourse is had to the comparison of the authentic texts, “the meaning which best reconciles the texts, having regard to the object and purpose of the [Statute]” must be adopted. In view of the above considerations regarding the object and purpose of the Statute, the Appeals Chamber considers that the meaning which best reconciles the texts is one which does not require that the “property and assets” referred to in article 93 (1) (k) of the Statute be derived from crime.

### 5. Conclusion

63. In view of the foregoing, the Appeals Chamber concludes that the [REDACTED] Chamber misinterpreted the law. There is no requirement that property and assets subject to a Chamber’s order and request for cooperation under articles 57 (3) (e) and 93 (1) (k) of the Statute be derived from or otherwise linked to alleged crimes within the jurisdiction of the Court. Therefore, the Impugned Decision must be reversed. In the present case, it is appropriate to remand the matter to the [REDACTED] Chamber [REDACTED].

## V. CLASSIFICATION

64. The Prosecutor filed her appeal on a confidential *ex parte* basis “because it relates to confidential and *ex parte* orders of the [REDACTED] Chamber” and “the reasons for the [REDACTED] Chamber’s classification, consistent with rule 99(2),

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assets” ([Report of the Preparatory Committee on the Establishment of an International Criminal Court](#), DOCUMENT A/CONF.183/2, 14 April 1998, p. 61). No change was subsequently made in this respect. Other aspects of the preparatory work suggest that the drafters’ intention was to limit the application of the protective measures under articles 57 (3) (e) and 93 (1) (k) of the Statute to property and assets linked to the charged crimes and to the purpose of forfeiture as a penalty. For instance, proposals explicitly providing for protective measures to be taken in respect of all of the property of an accused person for the ultimate purpose of providing compensation to victims were rejected (Preparatory Committee on the Establishment of an International Court 1-12 December 1997, *Report of the Working Group on Penalties*, 18 December 1997, A/AC.249/1997/L.9/Rev.1, pp. 67-68; United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Report of the Working Group on International Cooperation and Judicial Assistance*, 1 July 1998, A/Conf.183/13 (Vol.III) incorporating A/CONF.183/C.1/WGIC/L.11, p. 329). It is also noted that while the early versions of the future article 57 (3) (e) specifically refer to reparations as the purpose of the protective measure of freezing assets, the version of 9 July 1998 removes the reference to reparations. United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Working paper on article 57 bis*, A/Conf.183/13(Vol.III) incorporating A/CONF.183/C.1/WGPM/L.64, p. 277).

continue to apply”.<sup>79</sup> However, the Prosecutor requests that the Appeals Chamber “make the gravamen of its legal reasoning – and legal conclusion – publicly available on an interim basis in a suitable form so that it may be available for use in other cases”, while “preserving the confidential and *ex parte* nature of the freezing order in this case, and especially the identity of [REDACTED] as its subject”.<sup>80</sup>


65. [REDACTED].

## VI. APPROPRIATE RELIEF

66. On an appeal pursuant to article 82 (1) (d) of the Statute, the Appeals Chamber may confirm, reverse or amend the decision appealed (rule 158 (1) of the Rules of Procedure and Evidence). In the present case, it is appropriate to reverse the Impugned Decision and remand [REDACTED].

[REDACTED] append a joint partly dissenting opinion to this judgment.

Done in both English and French, the English version being authoritative.


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**Judge Howard Morrison**  
**Presiding Judge**

Dated this [REDACTED]

At The Hague, The Netherlands

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<sup>79</sup> Document in Support of the Appeal, para. 6.

<sup>80</sup> Document in Support of the Appeal, para. 43.